Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	WB Docket No. 04-245
Declaratory Ruling and Preemption of	)	
State Action	)	

COMMENTS OF

Z-TEL COMMUNICATIONS, INC.

Thomas M. Koutsky, Esq.
1200 19th Street, N.W., Suite 500
Washington, DC 20036
Tel: (202) 955-9652

Michael B. Reith
Vice President, Z-Tel Communications, Inc.
601 South Harbour Island Blvd, Suite 220
Tampa, FL 33602
Tel: (813) 233-4531

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SUMMARY

BellSouth's "emergency" petition to overturn the Tennessee Regulatory Authority's decision in the ITC^DeltaCom arbitration is a slap in the face to the TRA's and other state commission's efforts to fulfill their responsibilities under sections 252 and 271. In approving BellSouth's Tennessee 271 application, the Commission gave the TRA accolades for the "significant time and effort" it spent "overseeing BellSouth's implementation of the requirements of section 271." Moreover, the Commission also clearly stated that BellSouth "must" satisfy its checklist obligations in Tennessee "*pursuant to state-approved interconnection agreements that set forth prices . . . for each checklist item*." As a result, the TRA was well within its authority to establish a price for the section 271 switching network element in an interconnection agreement arbitration proceeding.

In these Comments, Z-Tel shows that the very structure of sections 252 and 271 gives state commissions a central role in implementing the section 271 "competitive checklist" that the Commission cannot displace. First, the statutory provisions do not present any ambiguity – the section 271 "competitive checklist" must be implemented through the section 252 interconnection agreement process, which includes arbitration by state commissions. The Commission recognized this structure in its grants of interLATA authority to the BOCs. Second, granting BellSouth's petition would result in bad public policy, because the Commission has recognized on multiple occasions that state commissions are best suited to establish specific rates for network elements. Finally, BellSouth's petition should be rejected because it constitutes an appeal of a section 252 "determination", and section 252(e)(6) places exclusive jurisdiction for such an appeal in the "appropriate Federal district court", not this Commission.

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In approving BellSouth's Tennessee 271 application, the Commission recognized "the vital role" state commissions undertake to implement section 271 and extolled the Tennessee Regulatory Authority's ("TRA's") expenditure of "significant time and effort overseeing BellSouth's implementation of the requirements of section 271." The Commission specifically noted with approval the fact that the TRA was "committed . . . to actively monitor BellSouth's continuing efforts to open local markets to competition."[1] The Commission also observed in the Tennessee proceeding that "just as it is impractical for us to conduct a *de novo* review of the state commissions' pricing determinations, it is likewise generally impractical to make determinations about issues that were not specifically raised before the state commissions in the first instance."[2] The Commission emphasized its belief that "cooperative state and federal oversight and enforcement" would be able to ensure that local markets in Tennessee remain open.[3]

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1 *In the Matter of Application By BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee,* WC Docket No. 02-307, Memorandum Opinion and Order, 17 FCC Rcd 25828, 25830 ¶ 2 (2002) ("*Florida/Tennessee 271 Order"*).

2 *Id.*, at ¶ 21.

3 *Id.* at ¶ 183.

In the ITC^DeltaCom section 252 arbitration, the TRA did precisely what the FCC gave it accolades for doing in 2002. The TRA was presented with an "open issue" between a requesting carrier (ITC^DeltaCom) and an incumbent LEC (BellSouth) that arose during interconnection agreement negotiations, and the TRA resolved that issue under its section 252 authority. In section 251 interconnection negotiations between BellSouth and ITC^DeltaCom, BellSouth proposed to ITC^DeltaCom a rate for switching where switching was not required to be unbundled pursuant to section 251(c). ITC^DeltaCom disagreed with BellSouth's proposed rate. Eventually, a section 252 arbitration proceeding was initiated before the TRA in which this open issue was submitted, along with several other unresolved issues. Parties made "best and final offers", and ITC^DeltaCom proposed a rate of $5.08 that did not rely upon TELRIC pricing principles, complete with cost support. BellSouth proposed a rate that had no record evidence supporting it. To resolve this dispute as section 252 asks, the TRA applied the "just and reasonable" standard for BellSouth's obligation to provide switching pursuant to the section 271 competitive checklist that the Commission established in the *Triennial Review Order*.[4]

Z-Tel Communications, Inc. ("Z-Tel"), headquartered in Tampa, Florida, currently offers competitive service in Tennessee and all of the other eight states in the BellSouth region, as well as the regions of the other three Regional Bell Operating Companies. In providing our competitive service to residential and small business consumers in these states, Z-Tel is dependent upon access to the local networks of those BOCs, and the section 271 implementation process, where state commissions took affirmative action to implement each and every item of

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[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 2003 FCC LEXIS 5697, ¶¶ 653-55 (rel. Aug. 21, 2003)

the competitive checklist, paved the way for Z-Tel's entry. As a result, Z-Tel is intensely interested as to whether the Commission will accept BellSouth's invitation to undo and usurp all of the pro-competitive actions taken by state commissions in recent years and misappropriate to itself the exclusive responsibility for ensuring that local markets remain open.

BellSouth asks the Commission to re-write key provisions of the 1996 Act. Fortunately, this Commission is not free to do so. In these Comments, Z-Tel shows that the very structure of sections 252 and 271 gives the TRA and other state commissions a central role in implementing the section 271 "competitive checklist" that the Commission cannot displace. Indeed, when the Commission approved BellSouth's Tennessee 271 application, it stated – clearly and definitively – that BellSouth "must" satisfy its checklist obligations "*pursuant to state-approved interconnection agreements that set forth prices . . . for each checklist item.*"[5] As a result, the TRA was well within its authority to establish a price for the section 271 switching network element in an interconnection agreement arbitration proceeding.

BellSouth's "emergency" petition to overturn the TRA's decision is therefore a slap in the face to the TRA's and other state commission's efforts to fulfill their responsibilities under sections 252 and 271. Section 252 gives the TRA the authority to arbitrate any "open issue" submitted to it, and that is what the TRA did when it established an interim rate for switching. BellSouth, unhappy with this result yet apparently unwilling to follow the exclusive federal district court appeal route provided for in section 252(e), now wants the Commission to rule that

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("*Triennial Review Order*"), *vacated in part and aff'd in relevant part, United States Telecom Ass'n v. FCC*,359 F.3d 554 (D.C. Cir. 2004) ("*USTA II"*).

5 *Florida/Tennessee 271 Order*, Appendix D at ¶ 5.

the TRA acted outside of its authority by establishing a rate and asks that the Commission assert "exclusive" authority over implementation of the section 271 checklist.[6]

The Commission must reject BellSouth's gambit for three principal reasons. First, as discussed below, the relevant statutory provisions do not present any ambiguity – the section 271 "competitive checklist" must be implemented through the section 252 interconnection agreement process, which includes state commission arbitration. The Commission repeatedly recognized this structure in its grants of interLATA authority to the BOCs. Since the statutory text offers no alternative reading, the Commission cannot legitimately put forward a contrary interpretation. Second, granting BellSouth's petition would result in bad public policy, because the Commission has recognized on multiple occasions that state commissions are best suited to establish specific rates for network elements. Finally, BellSouth's petition should be rejected because it constitutes an appeal of a section 252 "determination", and section 252(e)(6) places exclusive jurisdiction for such an appeal in the "appropriate Federal district court", not this Commission.

I. THE TRA PROPERLY ACTED TO ESTABLISH A RATE FOR A NETWORK ELEMENT REQUIRED BY THE SECTION 271 COMPETITIVE CHECKLIST

There is no dispute that the competitive checklist, 47 U.S.C. § 271(c)(2)(B), obligates BellSouth to provide requesting carriers access to specifically-enumerated network elements (notably, loop transmission, transport, switching and call-related databases) on an continuing, on-going basis that is independent of the "impairment" standard set forth in section 251(d)(2). There also is no dispute – and, indeed, BellSouth admits in its petition – that "switching"

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[6] *Emergency Petition for Declaratory Ruling and Preemption of State Action of BellSouth Telecomms., Inc.,* WC Docket No. 04-245 (filed Jul. 1, 2004) ("BellSouth Petition") at 10.

required by 47 U.S.C. § 271(c)(2)(B)(vi) is a "network element."[7] And there can be no dispute that a state commission, in the context of an arbitration brought before it pursuant to section 252, has the ultimate authority to "establish" the rates for "network elements."[8] And that is precisely what the TRA did – it applied the applicable federal pricing standard to the "network element" of switching.

In *Chevron*, the Supreme Court held that "[i]f the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] In this Section, Z-Tel shows how the clear statutory provisions of the 1996 Act, including sections 252 and 271, in addition to Commission precedent, unambiguously support the TRA's actions in the BellSouth-ITC^DeltaCom arbitration. Z-Tel shows that (a) the rate or "charge" for a section 271 network element must be contained in an interconnection agreement or SGAT approved by a state commission pursuant to section 252; (b) as a result, the dispute between ITC^DeltaCom and BellSouth over the price for the section 271 switching element was an "open issue" presented to the TRA that it had authority under section 252 to resolve through arbitration; and (c) the TRA properly acted to "establish" the rate for the section 271 switching network element consistent with the FCC's just, reasonable and nondiscriminatory pricing standard.

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7 *Triennial Review Order* ¶ 663 (referring to the "pricing of *network elements* that do not satisfy the standards of section 251(d)(2)" as being subject to regulation pursuant to a "just, reasonable and nondiscriminatory" standard of review); BellSouth at 5 ("RBOCs are currently obligated under 47 U.S.C. § 271 to provide certain enumerated *network elements* to CLECs irrespective of whether CLECs are impaired without access to such elements.") (emphasis added); 47 U.S.C. § 3(29) (definition of "network element"). As used in the 1996 Act and by the Commission, "unbundled network elements" (or "UNEs") are a subset of "network elements"; UNEs include "network elements" that must be unbundled pursuant to 47 U.S.C. § 251(c)(3).

8 47 U.S.C. § 252(c)(2).

9 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

A. Rates or "Charges" for Section 271 Network Elements Must Be Contained in Interconnection Agreements or SGATs Approved by State Commissions Pursuant to Section 252

By operation of law, the rates, terms and conditions for access to a network element required by the section 271 "competitive checklist" *must* be contained in an interconnection agreement or SGAT approved by a state commission under section 252. BellSouth argues vociferously that the switching rate issue was not properly before the TRA in the section 252 process, but that position fails to address the basic structure of the 1996 Act. Indeed, Congress quite clearly put state commissions in the center of the section 271 checklist process and *mandated* that *all* checklist items be provided for in agreements or SGATs that are subject to the section 252 process.

The plain, unambiguous meaning of section 271(c) demonstrates this state commissions role. Indeed, no BOC could have been able to receive interLATA authority *without* state commissions implementing the competitive checklist into interconnection agreements or SGATs through section 252. As a result, the TRA's exercise of its section 252 authority in the BellSouth-ITC^DeltaCom arbitration was consistent with the federal scheme, and, in fact, dictated by the 1996 Act.

Section 271(c)(1)(A) specifically provides that in order to obtain interLATA approval, a Bell operating company must show that it has "entered into one or more binding agreements *that have been approved under section 252* specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities" to competitors, 47 U.S.C. § 271(c)(1)(A). Section 271(c)(2) further requires that that those "Track

A" section 252 interconnection agreements must satisfy *each* of the checklist obligations listed in section 271(c)(2)(B):[10]

> (A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph [271(c)(2)] if, within the State for which the authorization is sought—
>
> (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) . . . and
>
> (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.
>
> (B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph is such access and interconnection includes each of the following:…
>
> (vi) Local switching unbundled from transport, local loop transmission, or other services.[11]

These provisions require that section 271 network elements be included in state-approved interconnection agreements in order for a BOC to be in compliance with section 271.

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[10] Although not relevant to this proceeding, a BOC also may satisfy section 271 checklist requirements through a Statement of Generally Available Terms and Conditions, or SGATs. That "Track B" opportunity was designed by Congress to address situations in which a BOC may have taken all steps to open its market to competition, yet no CLEC attempted to enter the market. No Bell operating company has successfully pursued a "Track B" section 271 authorization. In Tennessee, Track B was unavailable to BellSouth because CLECs did attempt to enter and serve both residential and business customers in the state. *Florida/Tennessee 271 Order* at ¶¶ 8-10.

However, Congress's decision to permit a BOC to comply with the section 271 competitive checklist through an SGAT in certain situations reinforces the central role that Congress gave state commissions to oversee implementation of the checklist. To satisfy "Track B", a Bell must show each item of the "competitive checklist" is provided for in an SGAT that the State commission has approved or permitted to take effect under section 252(f). Section 252(f) permits the state commission is to review an SGAT utilizing the same standard of review as arbitrated interconnection agreements, including the pricing standard for "network elements" provided for in section 252(d). Section 252(f) further provides that a State commission may "establish[] or enforce[e] other requirements of State law in its review" of the SGAT. 47 U.S.C. § 252(f)(2).

[11] 47 U.S.C. § 271(c)(2)(A)-(B).

Additionally, by definition, a section 252 interconnection agreement *must* include the rate or "charge" for access to any "network element." Section 252(a)(1) clearly states that an interconnection agreement must contain a "detailed schedule of itemized charges for each interconnection service and network element included in the agreement."[12] It is the unambiguous intent of Congress that section 271 network elements be implemented in section 252 interconnection agreements and that those agreements must include the "charges" for that network element.

The legislative history shows that this is also the most reasonable interpretation of Congress's intent. The Senate committee that drafted the checklist made clear that it "did not intend the competitive checklist to be a limitation on the interconnection requirements contained in section 251." Rather, the Committee stated that it intended the competitive checklist to set forth "what must, at a minimum, be provided by a Bell operating company in any interconnection agreement approved under section 251 to which that company is a party . . ."[13]

Given these statutory requirements and legislative history, the Commission has consistently decided that section 271 checklist obligations are to be implemented through state-approved 251 interconnection agreements. In its 1997 Order rejecting Ameritech's Michigan application, the Commission first made clear that "[w]ith regard to each checklist item, the Commission must first determine whether the terms of the interconnection agreement establish the BOC's obligation to provide a particular checklist item comply with the Act."[14] Notably, the Commission has routinely held in its section 271 decisions (including Tennessee) that for a BOC

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12 47 U.S.C. § 252(a)(1).

13 S. Rep. 104-23, 104th Cong., 1st Sess. 43 (1995).

14 *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in*

to meet a checklist item, it "must show that it has a concrete and specific legal obligation to furnish the item upon request *pursuant to state-approved interconnection agreements that set forth prices* and other terms and conditions for each checklist item."[15]

BellSouth argues that the *Texas 271 Order*[16] stands for the proposition that state commissions have no authority to review the rates for "non-251" checklist items in section 252 interconnection agreements. That interpretation is incorrect. In 1999, the FCC "de-listed" operator services and directory assistance from the section 251(c)(3) unbundling requirements, but specifically noted that BOCs were still required to provide access to OS/DA pursuant to the "just and reasonable" (and not TELRIC) standard. Accordingly, the T2A – the section 252-arbitrated Texas Telecommunication Agreement that was approved by the Texas Commission and which was the cornerstone of SWBT's Texas application – contained specific rates, terms and conditions for OS/DA services, despite their "de-listed" status. As the FCC recognized in the *Texas 271 Order*, no party challenged those rates in the Texas proceeding, so there was no "open issue" over OS/DA pricing for the Texas Commission to resolve in the context of a section

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Michigan, Memorandum Opinion and Order, CC Docket No. 97-137, 12 FCC Rcd 20543 ¶ 113 (1977).

15 *Florida/Tennessee 271 Order*, Appendix D, ¶ 5 (emphasis added). These statutory provisions and Commission precedent stand contrary to BellSouth's point that "Congress did not authorize a state commission to ensure than an agreement satisfies section 271." BellSouth Petition at 7. To the contrary, section 271 *can only be satisfied* if state commissions approve interconnection agreements that contain *all* items on the "competitive checklist." BellSouth may not have thought about the logical consequence of its argument in this proceeding – if BellSouth is successful and the TRA begins to approve agreements that do not contain or reference the rates, terms and conditions of this checklist item, BellSouth would no longer be in compliance with the "competitive checklist" and its interLATA authority would be subject to revocation.

16 *Application by SBC Communications, Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996, to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000).

252 arbitration. As a result, the FCC deferred to the Texas Commission's judgment that SWBT met the OS/DA checklist item.[17]

Therefore, the unambiguous meaning of the statute, the legislative history, and Commission precedent all point in one direction – the rates, terms and conditions of network elements that are specifically-enumerated in the section 271 competitive checklist (like switching) must be spelled out in section 252 interconnection agreements between BOCs and requesting carriers. Those agreements are to be submitted to state commissions pursuant to section 252, and they must contain a "detailed schedule of itemized charges for each . . . network element."[18]

B. Pursuant to section 252, the TRA had authority to "resolve" "any open issue" between ITC^Delatcom and BellSouth, including the "rate" for the section 271 switching "network element"

Since rates, terms and conditions of access to section 271 network elements must be made available in state-approved section 252 interconnection agreements, state commissions clearly have the authority to resolve "any open issue" that surrounds those rates, terms and conditions.[19] As the record shows and the Petition admits, the question as to what price BellSouth would charge ITC^DeltaCom for switching was unresolved by the parties during section 252 negotiations, and the issue was submitted to arbitration pursuant to section 252(b). BellSouth's argument that this was an "improper assertion of jurisdiction" (BellSouth Petition at 4) utterly fails to recognize that the plain language of the 1996 Act gives the TRA the authority to resolve this dispute.

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17 *Id.* at ¶ 351 ("No commenter has challenged SWBT's rate for directory assistance in Texas, and the Texas Commission concluded that SWBT meets this checklist item.")

18 47 U.S.C. § 251(a)(1).

A state commission has the authority to resolve such "open issues" between incumbent LECs and requesting carriers with regard to section 252 interconnection agreements. The Sixth Circuit stated that section 252 is a "detailed procedural scheme" and that this "interconnection agreement process is central to the Act. . . . *[A]ll* interconnection agreements must be reviewed, and approved or rejected, by the relevant state commission."[20] Since section 271 and Commission precedent specifically provide that checklist elements must be included in section 252 agreements, there can be no serious argument that if a BOC and a requesting carrier disagree on the rates, terms and conditions of access to section 271 network elements, that disagreement constitutes an "open issue" that a state commission has the authority to resolve.

Moreover, it is Z-Tel's understanding that BellSouth voluntarily placed the rates, terms and conditions of section 271 switching at issue in its negotiations with ITC^DeltaCom. It was BellSouth that originally proposed a monthly rate for switching more than 640% higher than the just and reasonable TELRIC rate and a non-recurring rate 4,000% higher than TELRIC. ITC^DeltaCom disputed that rate and made a counteroffer. The issue was not resolved by negotiations, so it was submitted to the TRA for binding arbitration as one of several "open issues." The Fifth Circuit recently ruled that "where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by section 251(b) and (c), those issues are subject to compulsory arbitration under section 252(b)(1). The jurisdiction of the PUC

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19 47 U.S.C. §§ 252(b)(1) ("the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues."); (b)(4)(C) ("The State commission shall resolve each issue set forth in the petition and response").

20 *Verizon North, Inc. v. Strand,* 309 F.3d 935, 941 (6th Cir. 2002) (emphasis in original). Tennessee is in the Sixth Circuit.

as arbitrator is not limited by the terms of section 251(b) an (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations."[21]

Once "any open issue" is submitted to the state commission under section 252(b)(1), section 252(b)(4)(C) provides that,

> The State commission **shall resolve each issue** set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.[22]

The TRA's authority to "establish" a rate for the switching "network element" is explicitly provided for in section 252(c), entitled "Standards for Arbitration":

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall:…
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d)… [23]

The Supreme Court has stated that this provision "entrusts the task of establishing rates to the state commissions."[24]

The Eleventh Circuit opinion in *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.,*[25] even if it were applicable in Tennessee, would not limit the TRA's authority to arbitrate interconnection agreement disputes over specific checklist items. In that case, BellSouth disputed the Florida Public Service Commission's ability to arbitrate a dispute between MCI and BellSouth on the terms and conditions of a performance monitoring and liquidated damages plan.

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21 *Coserv v. Southwestern Bell Telephone Co., et al.,* 350 F.3d 482, 487 (5th Cir. 2003).

22 47 U.S.C. § 252(b)(4)(C).

23 47 U.S.C. § 252(c).

24 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).

The Eleventh Circuit disagreed with BellSouth and held that the FPSC could arbitrate that dispute because that performance and damages plan "clearly falls within the FPSC's authority." The Eleventh Circuit held that the state commission has the authority to arbitrate disputes over items specifically-referenced in "the text of the statute" that incumbents are "required to negotiate."[26] As discussed above, the section 271 checklist items are specifically-enumerated, statutory requirements for BOCs. The relevant provisions of the statute (subsections 271(c)(1) and (2)(A)) clearly requires that the rates, terms and conditions of these checklist items must be inserted in section 252 interconnection agreements or SGATs, and the legislative history supports that view. Moreover, these is no dispute that section 271 switching is a "network element", and section 252(a)(1) states that an interconnection agreement *must* detail the "charges" for "network elements, and section 252(d) clearly gives state commissions the authority to resolve disputes and "establish" a rate for "network elements." As a result, the TRA's decision to resolve this dispute over a specifically-enumerated section 271 network element is wholly consistent with the Eleventh Circuit's holding in *MCI.*[27]

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25 298 F.3d 1269 (11th Cir. 2002).

26 *Id.* at 1294.

27 BellSouth attempts to portray the *MCI* decision as the governing law that limits section 252 arbitrations only to "section 251" (and not 271) issues. The *MCI* decision does not stand for that proposition, as it decided that the FPSC did have authority to arbitrate performance plans and damage provisions. At most, *MCI* stands for the proposition that only matters specifically-referred to in the Act may be arbitrated by state commissions, as the *MCI* court found that performance plan at issue was specifically-referenced in section 252. Similarly, BellSouth's 271 checklist obligations are similarly referenced in the Act, and subsection 271(c)(1)(A) and 271(c)(2)(A) directly incorporate those items and make clear that checklist obligations be incorporated into BOC section 252 agreements.

Moreover, even if the *MCI* decision stands for the proposition BellSouth contends, it is not undisputed legal authority. After the *MCI* decision, the Fifth Circuit took a contrary view noting that "Congress knew that these non-251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the PUC." *CoServ*, 350 F.3d at 487.

In summary, the TRA was well within its statutory authority to move to "establish" the rate for the switching "network element" set forth in the competitive checklist. As Section I.A showed, the rates, terms and conditions of access to section 271 checklist items must be contained in state-approved section 252 interconnection agreements. This Section II.B showed that if negotiations between an incumbent LEC and a requesting carrier fail, a state commission has the authority to resolve through binding arbitration "any open issue" that is presented to it. The rate for the switching network element was one of several unresolved "open issues" between ITC^Delatcom and BellSouth, so the TRA had authority under section 252(c) to resolve that dispute. Moreover, Section 252(c)(2) specifically vests the authority to establish rates for "network elements" with the state commission – as the Supreme Court stated, the states have the authority to "determine[e] the concrete result in particular circumstances." That is what the TRA did here.

C. The TRA had authority to "establish" the section 271 switching network element rate by applying the FCC's "just, reasonable and nondiscriminatory" pricing standard

BellSouth cites passages in the *Triennial Review Order* for the proposition that the FCC preempted and took away state commission's authority to establish rates for section 271 network elements. Those arguments fail.

First and foremost, as discussed in Sections I.A and I.B above, even if the FCC wanted to, it *could not* preempt or take away the state commission's authority to "establish" rates for network elements. A plain, unambiguous reading of the statutory provisions reveals that Congress intended that state commissions operating pursuant to their section 252 authority are central to the section 271 process. Indeed, no section 271 application could go forward *until* a

state commission had approved interconnection agreements or SGATs that included the rates, terms and conditions for *every* checklist item, including switching.

Second, the FCC in the *Triennial Review Order* did not preempt state commission authority to establish rates for section 271 network elements. As it did with the TELRIC standard for section 251(c)(3) unbundled network elements, in the *Triennial Review Order,* the Commission articulated a pricing standard that state commissions may apply in resolving disputes over the rates for this class of network elements:

> The pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[28]

In paragraph 664, the Commission again referred to the pricing methodology for section 271 network elements as a "pricing standard," noting that the "appropriate inquiry for network elements required under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[29] In no place did the Commission state that state commissions were forbidden from utilizing their section 252 authority to apply this methodology and "establish" a particular rate.[30] Simply by use of the passive voice, the Commission did not – and could not – divest state commissions of the pricing responsibility the Act gives them.

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28 *Triennial Review Order* ¶ 663.

29 *Triennial Review Order* ¶ 664.

30 To do so would, of course, fly in the face of the plain meaning of section 252, Commission precedent, and Supreme Court's *AT&T* opinion.

In the *Triennial Review Order,* the Commission decided to establish a different pricing methodology for section 271 network elements than the TELRIC pricing standard that applies to section 251 unbundled network elements. Simply because the Commission shifted from TELRIC to a "just, reasonable and nondiscriminatory" pricing standard for a particular class of "network elements" does not mean that the regulatory body tasked by Congress with "establish[ing]" the rates for those network elements changed. For the Commission to do so, it would have to change the basic framework of the Act, which it is not permitted to do.

The only authority BellSouth raises are wholly outside of the section 252 context and relate to instances in which the FCC's authority to establish rates for interstate and international common carrier services was in question.[31]

Contrary to BellSouth's assertion, the *USTA II* decision supports Z-Tel's analysis.[32] In *USTA II,* as BellSouth notes, the court found it was proper for the FCC to have established a different pricing standard for section 271 network elements than the TELRIC standard for section 251 network elements.[33] The D.C. Circuit affirmatively stated that the *Triennial Review Order* in and of itself did not preempt state commission jurisdiction and called such assertions "unripe."

* * *

Supported by hyperbole and platitudes that refer to the impending doom of "uncertainty" and allegations of an "improper assertion of jurisdiction" that "misconstrues the law," BellSouth asks the Commission to "avoid state commission regulation of network elements provided under

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31 BellSouth Petition at 10.

32 BellSouth Petition at 9-10.

33 *USTA II,* slip op. at 52.

section 271" and "preempt any state commission determination that attempts to regulate the rates, terms, or conditions of any element provided pursuant to Section 271."[34] What BellSouth misses is that Congress unambiguously wrote a strong, state role in implementing the section 271 checklist into the 1996 Act. The Commission simply cannot rewrite the 1996 Act in the manner that BellSouth asks.

As Z-Tel has shown, sections 252 and 271 are interrelated and directly tied to one another by statutory reference. Sections 271(c)(1) and 271(c)(2)(A) *directly* incorporate state section 252 review of a BOC's compliance with the "competitive checklist." By operation of law, a BOC *cannot* offer interLATA services unless it has in place interconnection agreements or SGATs that are approved by the state commission that contain the rates, terms and conditions for *every* checklist item. Those checklist requirements apply regardless of section 251 requirements – even section 271 network elements that are "de-listed" from section 251 must be included in section 252-approved agreements. Moreover, Commission precedent on this point has been clear – in approving the Tennessee 271 application, the Commission stated that a BOC "must" satisfy its checklist obligations "*pursuant to state-approved interconnection agreements that set forth prices . . . for each checklist item*."[35]

As Z-Tel shows in this Section I, the statutory provisions offer no ambiguity on this point. This result flows from a syllogistic read of the relevant provisions of 1996 Act: (a) the rates, terms and conditions of a section 271 network element must be contained in an interconnection agreement or SGAT approved by a state commission pursuant to section 252; (b) pursuant to section 252, a dispute over the rate for the section 271 switching element is an "open issue" that may be presented to a state commission for arbitration; and (c) in such an arbitration,

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[34] BellSouth Petition at 1, 4-5, 12.

a state commission shall "establish" the rate for the section 271 switching network element consistent with the applicable FCC pricing standard. The TRA and ITC^DeltaCom simply did what a logical and unambiguous reading of the Act told them to do.

II. THE COMMISSION HAS INVITED CARRIERS AND STATE COMMISSIONS TO ADDRESS NETWORK ELEMENT PRICING DISPUTES AT THE STATE, NOT FEDERAL, LEVEL

Not only would granting BellSouth's petition be contrary to law, peculation of all section 271 enforcement authority to the Commission would mark a substantial change in Commission precedent and would be bad public policy.

First, contrary to BellSouth's argument, the Commission has not appropriated section 271 enforcement authority solely to itself. In the *New York 271 Order*, the Commission specifically endorsed the New York Public Service Commission's enforcement activities and the Commission invited parties to take issues to the state as a matter of first resort:

> Complaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission, or specific performance monitoring and enforcement mechanisms imposed by a state commission, should be directed to that state commission rather than the FCC.[36]

The Commission made similar salutary statements in other section 271 determinations, often noting, as it did in its first section 271 authorization, that it will work "in concert" with state commissions over ensuring continuing compliance with section 271.[37] For example, with regard

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35 *Florida/Tennessee 271 Order,* Appendix D at ¶ 5 (emphasis added).

36 *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4174 ¶ 452 (1999).

37 *Id.*, 15 FCC Rcd at 4174 ¶ 453 ("[w]orking in concert with the New York Commission, we intend to monitory closely Bell Atlantic's post-entry compliance . . ."); *see also id.* ("obtaining section 271 authorization is not the end of the road . . . Congress deemed

to Kansas and Oklahoma, the Commission noted that "we are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma markets."[38]

In other states, BOCs have made commitments to subject themselves to state commission review and oversight over their checklist compliance as a condition of state approval of their section 271 application. For example, the Maine Commission conditioned its support for Verizon's 271 application by requiring Verizon to file a comprehensive state wholesale tariff that included the rates, terms and conditions for each checklist item.[39] The Commission later applauded the Maine Commission for "diligently and actively conducting" that proceeding. In fact, the Commission dismissed a concern raised by a competitor regarding Verizon's legal obligation to provide nondiscriminatory access in Maine, specifically noting that Verizon's filing of the wholesale tariff before the Maine Commission will "resolve[]" that concern.[40]

Second, the Commission has made it clear that in implementing and enforcing section 271, it expects that parties will take those pricing disputes to *state commissions* before raising an issue before the Commission under section 271. The Commission's practice in enforcing section 271 has, in fact, been one of giving state commissions the "first crack" at network element pricing determinations and instructing competitors to take pricing disputes to the state commissions as a matter of first impression. In doing so, the Commission has often cited its

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satisfaction of section 271's requirements at a single moment in time insufficient to ensure continuing competition in local markets.").

38 *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6242 ¶ 10 (2001).

39 *In the Matter of Application of Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Maine,* CC Docket No. 02-61, Memorandum Opinion and Order, FCC 02-187, ¶ 6, n.13 (rel. June 19, 2002).

belief that state commissions, by being closer to the facts and local conditions, were in a far better position than the federal Commission to establish specific rates.

For example, in 2002, the Commission dismissed WorldCom's section 271(d)(6) complaint against Verizon with regard to Verizon's rate for switching in Massachusetts, noting in several instances its decision deferred to the Massachusetts Department of Telecommunicatins and Energy's actions in establishing the switching rate.[41] Even Chairman Michael K. Powell stated:

> [W]e should allow states to develop and update UNE rates without unwarranted intervention or preemptive actions by this Commission where none are necessary to prevent harm to competition or consumers. . . . WorldCom's request here amounts to a collateral attack on the sound conclusion Congress granted to the states the authority to set UNE rates. . . . I want to express my deep appreciation for the enormous dedication and acumen demonstrated by the Massachusetts DTE in this matter…. [42]

The D.C. Circuit recognized the Commission's policy in *Sprint Communications Co. v. FCC*, noting that "when the Commission adjudicates section 271 applications it does not – and cannot – conduct a *de novo* review of state pricing determinations. . . ."[43]

The Commission's historical deference to state network element rate-setting extends even beyond network elements that are required by section 251. In fact, in the same proceeding in which it granted BellSouth's Tennessee 271 application, the Commission deferred to state commission review a dispute over a BellSouth proposal to assess an interstate special access

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40 *Id.* at ¶ 43, n.187

41 *WorldCom, Inc. v. Verizon New England Inc., et al,* File No. EB-02-MD-017, Memorandum Opinion and Order, FCC 02-219 (rel. Jul. 23, 2002) at n.78 (the Commission "will not conduct a *de novo* review of a state's pricing determinations"). The Commission noted that this deference "derives from the statutory framework, pursuant to which states establish rates in the first instance." *Id.*

42 *Id.,* Statement of Chairman Michael K. Powell at 1.

43 *Sprint Communications Co. v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001).

tariff rate for what BellSouth claimed was an element subject to section 251 unbundling. In that proceeding, AT&T disputed BellSouth's attempt to impose a $200 per-line, per-order "expedite" charge on Florida orders. Significantly, BellSouth drew this $200 expedite charge directly from its interstate special access tariff.[44] BellSouth claimed that it was improper for the Commission to consider the lawfulness of the $200 charge in the Florida/Tennessee 271 proceeding because that charge was not subject to section 251(c)(3) and because AT&T did not raise a dispute over that interstate special access tariff charge before the Florida Commission.[45] The Commission rejected AT&T's challenge to the rate, relying upon the fact that AT&T had not disputed the charge before the Florida Commission. In fact, the Commission specifically stated, "it is a dispute AT&T should present to the Florida Commission in the first instance."[46]

BellSouth now wants to have it both ways. Bellsouth was more than happy to have the Commission approve its Florida/Tennessee 271 application by referring to the state commission disputes over applying interstate special access charges to network elements. But now that it has received interLATA authority, it now wants the Commission to rip away state commission review of all ostensibly "non-251" items, arguing that Commission jurisdiction over such disputes is now magically "exclusive."

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44 *Florida/Tennessee 271 Order* at ¶¶ 45-51; *id. at* ¶ 47 ("BellSouth contends that, for charges not specified in the [AT&T interconnection] agreement, the agreement refers to the 'applicable BellSouth tariff.' In this case BellSouth states the 'applicable' tariff is the interstate special access tariff.")

45 *Florida/Tennessee 271 Order* at n.144 ("BellSouth contends that it need only charge TELRIC rates for providing nondiscriminatory access to UNEs that section 251(c)(3) requires.")

46 *Id.* at ¶ 50.

III. THE COMMISSION DOES NOT HAVE THE JURISDICTION TO RESOLVE BELLSOUTH'S PETITION

As discussed above, the dispute between BellSouth and ITC^DeltaCom over the price for section 271 switching was properly before the TRA pursuant to section 252 of the Act. The TRA exercised its authority under section 252(c)(2) to "establish" the rate for that network element. The exclusive remedy for appealing that action by the TRA is for BellSouth appeal to a federal district court pursuant to section 252(e). BellSouth did not do so and instead filed this "Emergency Petition." The Commission must dismiss BellSouth's petition so as not to unduly interfere with the exclusive jurisdiction over this issue that resides in Article III federal courts.

The sole and exclusive remedy for a party aggrieved by a state commission section 252 arbitration decision is to file an appeal in an appropriate federal court. Section 252(e)(6) explicitly states,

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.[47]

In *MCI Telecommunications Corp v. Bell Atlantic-Pennsylvania*, the Third Circuit found that "[f]ederal jurisdiction for the review of commission decisions on interconnection agreements is exclusive."[48]

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[47] 47 U.S.C. § 252(e)(6). The Commission only has authority to make section 252 determinations only if the state commission fails to act on an arbitration petition. 47 U.S.C. § 252(e)(6).

[48] 271 F.3d 491, 511 (3rd Cir. 2001); *accord GTE North v. Strand*, 209 F.3d 909 (6th Cir. 2000); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company*, 222 F.3d 323, 337 (7th Cir. 2000) ("Congress intended that such suits be brought exclusively in federal court."). Similarly, in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part AT&T Corp. v. Iowa Utils. Bd,* 525 U.S. 366 (1996), the Eighth Circuit cited the exclusive remedy of section 252(e)96) to reverse the Commission's attempt to exercise its section 208 authority to review section 252 interconnection agreements and state commission determinations. The Eighth Circuit stated that "subsection 252(e)(6) directly provides for federal district court review of state commission determinations when parties

ITC^DeltaCom has filed a Complaint for Declaratory Judgment against BellSouth, the FCC and the TRA in the Middle District of Tennessee in which it has requested that federal district court to confirm that that federal court is the appropriate and exclusive forum in which to resolve the legality of the TRA's actions in the ITC^DeltaCom-BellSouth arbitration.[49] Given the presence of a pending federal district court action, the Commission would be wise to dismiss BellSouth's petition in its entirety, or, at a minimum, defer any action in this docket until that federal court appeal is completed.

IV. CONCLUSION

The Commission has consistently lauded and applauded efforts by state commissions to ensure BOC compliance with the section 271 competitive checklist. The Commission stated in the *Florida/Tennessee 271 Order* (in addition to other 271 orders) that state commissions play a central role in ensuring that BOCs implement the checklist – noting specifically that a BOC "must" implement "each item" on the checklist through "state-approved interconnection agreements that contain prices."[50]

And that is what the TRA did in the ITC^DeltaCom-BellSouth proceeding. It followed the instructions of the 1996 Act and this Commission's precedent. The TRA's action was entirely consistent with the framework of the Act. In short, the Act states that:

> (a) the rates, terms and conditions of a section 271 network element *must* be contained in interconnection agreements or an SGAT that is approved by a state commission pursuant to the section 252 process;

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wish to challenge such determinations. . . . Congress did not intend to allow the FCC to review the decisions of state commissions." That holding of the Eighth Circuit was not appealed to the Supreme Court and therefore remains the binding law of the land.

49 *ITC^DeltaCom Communications, Inc. v. BellSouth Telecommunications, Inc., Federal Communications Commission, and the Tennessee Regulatory Authority,* Case No. 3:04-0611 (M.D. Tenn. filed Jul. 9, 2004).

50 *Florida/Tennessee 271 Order*, Appendix D at ¶ 5.

(b) section 252(a)(1) requires that a section 252 interconnection agreement must contain detailed, "charges" for "network elements"

(c) the section 252 process provides that any dispute over the rate for a network element, such as section 271 switching, is an "open issue" that may be presented to a state commission for arbitration;

(d) in resolving that "open issue", a state commission shall, pursuant to section 252(c)(2), "establish" the rate for a "network element" consistent with the applicable FCC pricing standard; and

(e) the exclusive forum for a party aggrieved by a state commission section 252 determination is federal district court – not the FCC.

Those provisions are clear and unambiguous, and they also represent the most reasonable interpretation of Congressional intent. As a result, BellSouth's Petition should be and must be dismissed. BellSouth and its BOC brethren may not like the result – but no amount of hyperbole or platitude can rewrite these key provisions of the 1996 Act. The statute says what the statute says.

Respectfully submitted,

[submitted electronically]

S/Thomas M. Koutsky
1200 19th Street, N.W., Suite 500
Washington, DC 20036
Telephone: (202) 955-9652

Michael B. Reith
Vice President, Z-Tel Communications, Inc.
601 South Harbour Island Blvd, Suite 220
Tampa, FL 33602
Telephone: (813) 233-4531

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